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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN G. LENAGHAN,

Defendant and Appellant.

B288397

(Los Angeles County
Super. Ct. No. SA094519)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathryn A. Solorzano, Judge. Reversed in part, affirmed in part, and remanded with directions.

Law Offices of Carl K. Osborne, Carl K. Osborne for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell and Lindsay Boyd, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant and appellant Kevin Lenaghan pleaded no contest to driving under the influence of an alcoholic beverage (DUI) within 10 years of three other DUI offenses (Veh. Code, §§ 23152, subd. (a);¹ 23550) (count 1) and driving with a .08 percent blood alcohol content within 10 years of three other DUI offenses (§§ 23152, subd. (b); 23550) (count 2). As to count 2, defendant admitted having a blood alcohol concentration that was 0.15 percent or more, by weight. (§ 23578.) As to both counts, the trial court sentenced defendant to two years in county jail, suspended execution of sentence, and placed defendant on formal probation for 36 months on various terms and conditions, including the condition he serve 270 days in county jail. The trial court awarded defendant two days of custody credit.

On appeal, defendant contends the trial court erred in its custody credit award by not including the 195 days he spent, pre-plea, in a residential rehabilitation facility at the order of the trial court. We reverse the trial court's custody credit award, remand for further proceedings as set forth below, and otherwise affirm the judgment.

II. BACKGROUND

On November 11, 2016, defendant was arrested for driving under the influence. He remained in custody until November 12, 2016, when he posted bond. The trial court (Judge Schwartz) imposed three conditions on defendant's bail: (1) do not use

¹ All further statutory references are to the Vehicle Code unless otherwise noted.

alcohol, (2) do not possess alcohol, and (3) do not drive without a valid driver's license. On November 25, 2016, defendant voluntarily entered Sea Change Recovery (Sea Change), an intensive full-time drug and alcohol treatment program.

On July 27, 2017, defendant appeared in court to be arraigned. Judge Solorzano, who was then presiding over defendant's case, confirmed that defendant was out of custody on bail and discussed any conditions Judge Schwartz had imposed on defendant's bail as follows:

"The Court: And are there conditions that were set by the court at the time of the arraignment?

"[Defense Counsel]: I'm unaware. I don't know.

"The Defendant: Yes, your honor.

"[Defense Counsel]: He's in a live-in program.

"The Court: So you are residing in a program presently?

"The Defendant: That's correct. [¶] The conditions were no alcohol consumption.

"The Court: Okay. [¶] And Judge Schwartz indicated do not use or possess any alcoholic beverages. Do not drive any motor vehicle without a valid driver's license. [¶] He had a very high BA in this case. And let me look at one other thing before we go over the conditions. [¶] And what live-in program are you in?

"The Defendant: Sea Change.

"The Court: Sea, S-E-A? Change, C-H-A-N-G-E?

"The Defendant: Sorry. S-E-A, like the ocean.

"The Court: That's what I thought.

"The Defendant: C-H-A-N-G-E. Sea Change.

"The Court: And continue to reside there as a condition of your bail in this matter.

“The Defendant: Yes, Sir.”

The trial court then continued the arraignment until August 17, 2017.

On December 13, 2017, the matter was set for a pretrial conference; defendant was going to enter an “open plea.” In connection with the hearing, defendant filed a brief in which he argued he was entitled to 195 days of custody credit for time spent at Sea Change after the trial court’s July 27, 2017, order that he remain there as a condition of bail.

At the hearing, the trial court (Judge Solorzano) addressed the terms of the sentence it intended to impose and the consequences of a plea. When the trial court advised defendant that he would have to serve a minimum of 180 days in county jail, defense counsel argued that defendant was entitled to credit for time spent in the “rehabilitation center” after the trial court’s order.

The trial court and defense counsel then had the following discussion:

“The Court: I never made any notes here that I indicated he’s ordered to stay in in-patient treatment, but maybe I did. [¶] In-patient treatment, was it something that was initiated before this case ever became before this court?

“[Defense Counsel]: Absolutely true.

“The Court: So you informed me that he was in-patient and I said okay, good, or I said stay there, you are ordered to stay there? [¶] Typically I would make a record of that, but I haven’t—I don’t want to belabor the point. We’re wasting precious time.

“[Defense Counsel]: No problem. I just recalled that it was a perfect condition of his bail. That was what I—

“The Court: I didn’t set bail in this case. Somebody else did.”

Having previously stated it needed additional time to ensure it was sentencing defendant correctly, the trial court continued the hearing. It added, “We’ll check our records at the time of the arraignment. If I made a statement, then I think he will be entitled to those credits. I’ll do my homework on it.”

At the subsequent February 6, 2018, hearing, the trial court addressed defendant’s argument that he was entitled to credit for time spent at Sea Change following the trial court’s order that he remain there as a condition of bail. The trial court stated that it had reviewed the record and there was no indication that Judge Schwartz ordered defendant to remain at Sea Change as a condition of bail. It then ruled that defendant was not entitled to 195 days of custody credit for time spent at Sea Change.

After the trial court addressed the terms and consequences of and alternatives to an open plea, defendant entered an open no contest plea to counts 1 and 2 and admitted the special allegation. On counts 1 and 2, the trial court sentenced defendant to two years in county jail, suspended execution of sentence, and placed defendant on formal probation for 36 months on various terms and conditions, including the condition he serve 270 days in county jail. The trial court awarded defendant two days of custody credit.

III. DISCUSSION

Defendant argues he was entitled to 197 days of custody credit—two days for his jail custody following his arrest, and 195

days for the time he spent at Sea Change after the trial court ordered him to remain there as a condition of bail. The Attorney General responds that the trial court did not order defendant to remain at Sea Change as a condition of bail, and, even if it did, defendant's stay there was not custodial for purposes of awarding credit.

A. *Whether the Trial Court's July 27, 2017, Order Required Defendant to Remain at Sea Change as a Condition of Bail*

"The provisions of Penal Code section 2900.5—entitling a defendant sentenced either to county jail or state prison to credit against the term of imprisonment for days spent in custody before sentencing as well as those served after sentencing as a condition of probation—apply to custodial time in a residential treatment facility as well as straight county jail time. (Pen. Code, § 2900.5, subd. (a); *People v. Johnson* [(2002)] 28 Cal.4th [1050,] 1053.)" (*People v. Jeffrey* (2004) 33 Cal.4th 312, 318.) "Term of imprisonment' includes any period of imprisonment imposed as a condition of probation or otherwise ordered by a court in imposing or suspending the imposition of any sentence" (Pen. Code, § 2900.5, subd. (c).) Accordingly, if defendant spent time at Sea Change as a result of the trial court's order, he could be entitled to custody credit for that time.

At the July 27, 2017, hearing, the trial court, in the course of inquiring about the conditions of defendant's bail, asked defendant, "And what live-in program are you in?" Defendant responded, "Sea Change." The trial court stated, "And continue to reside there as a condition of your bail in this matter." Defendant responded, "Yes, Sir."

The Attorney General argues the exchange between the trial court and defendant should be interpreted as a recitation of what the trial court believed to be the pre-existing conditions of bail. The record does not support the Attorney General's argument.

The trial court asked defendant if Judge Schwartz imposed conditions on defendant's bail. Defendant said, "Yes." The trial court then recited the conditions: (1) do not use alcohol, (2) do not possess alcohol, and (3) do not drive without a valid driver's license. The trial court did not list defendant's participation in a residential treatment program at Sea Change as one of Judge Schwartz's conditions.

The Attorney General next argues that implicit in the trial court's statement at the December 13, 2017, hearing that it "didn't set bail in this case," is the finding that it did not intend to modify defendant's bail. Whether or not the trial court intended to modify defendant's bail, its statement that defendant was to "continue to reside [at Sea Change] as a condition of [his] bail in this matter" plainly was an order that defendant was to remain at Sea Change as a condition of his bail.

B. *Whether Defendant's Required Stay at Sea Change Was Custodial for Purposes of a Credit Award*

"The term 'in custody' as used in section 2900.5, subdivision (a) has never been precisely defined. [Citation.] . . . 'It is clear from the words of the statute and from judicial decisions that, for purposes of credit, 'custody' is to be broadly defined. [Citations.] . . . The courts which have considered the question generally focus on such factors as the extent freedom of movement is

restricted, regulations governing visitation, rules regarding personal appearance, and the rigidity of the program's daily schedule. [Citation.] [¶] While no hard and fast rule can be derived from the cases, the concept of custody generally connotes a facility rather than a home. It includes some aspect of regulation of behavior. It also includes supervision in a structured life style.' [Citation.]" (*People v. Ambrose* (1992) 7 Cal.App.4th 1917, 1921 (*Ambrose*).)

"The question of whether a particular facility should be regarded as sufficiently restrictive as to amount to custody constitutes a factual question [citation], even though certain facilities by their very nature involve some restraint on untrammelled liberty [citation]. Although it is difficult to conceive of a live-in alcohol treatment program that does not include some modification of behavior and supervision, at least regarding the availability of alcohol, this does not necessarily constitute 'custody.'" (*Ambrose, supra*, 7 Cal.App.4th at p. 1922.)

Here, the trial court ruled that defendant was not entitled to custody credit for time spent at Sea Change after July 27, 2017, because defendant was not ordered to remain there as a condition of his bail. In light of that ruling, the trial court did not address or decide the factual issue of whether the relevant time defendant spent at Sea Change subjected him to sufficient restraints on his liberty so as to constitute "custody" within the meaning of Penal Code section 2900.5. (*Ambrose, supra*, 7 Cal.App.4th at pp. 1921-1922.)

The Attorney General acknowledges that Penal Code section 2900.5, by its express language, provides for an award of custody credit to a defendant who has been in custody at a rehabilitation facility. But a defendant who has been released on

bail is ineligible for custody credit, the Attorney General argues, because such a defendant is not in actual custody within the meaning of the bail statute, Penal Code section 1268 (“Admission to bail is the order of a competent Court or magistrate that the defendant be discharged from actual custody upon bail”). The Attorney General concludes, “The language of [Penal Code] section 2900.5 does not alter any other statute defining ‘custody.’ Most particularly, it does not alter [Penal Code] section 1268.”

We disagree with the Attorney General’s position. Penal Code section 1268 does not define “custody,” it defines “admission to bail.” For purposes of an award of custody credit, Penal Code section 2900.5, without reference to bail status, awards credit to a defendant who has been in custody in a rehabilitation facility whose liberty was sufficiently restricted. (Pen. Code, § 2900.5; *Ambrose, supra*, 7 Cal.App.4th at pp. 1921-1922.) Thus, Penal Code section 1268 does not preclude the awarding of custody credits to a defendant who posts bail.

Because the trial court did not address or decide the factual issue of whether restraints were placed on defendant’s liberty while he was at Sea Change after July 27, 2017, that were sufficient to constitute custody under Penal Code section 2900.5, we remand the matter to the trial court with directions to conduct an evidentiary hearing on the issue. If it determines there were sufficient restraints on defendant’s liberty, it is to award defendant custody credits under Penal Code section 2900.5 for that period of time that defendant was so restrained.

IV. DISPOSITION

The trial court's custody credit award is reversed and the matter is remanded to the trial court with directions that it conduct an evidentiary hearing to determine whether and for what period, if any, defendant's liberty at Sea Change was sufficiently restricted such that defendant was in custody within the meaning of Penal Code section 2900.5 and award custody credits as appropriate. The judgment is otherwise affirmed.

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KIM, J.

I concur:

JASKOL, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

The People v. Kevin G. Lenaghan
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BAKER, Acting P. J., Dissenting

I would affirm the trial court’s calculation of custody credits. As I read the record—and as the trial court itself read the record when presented with the relevant transcript before making the ruling challenged on appeal—the trial court did not modify defendant Kevin Lenaghan’s (defendant’s) conditions of bail to make continued residence at the Sea Change alcoholism treatment facility compulsory. Rather, the court asked defense counsel what conditions of bail had been previously imposed by another judge, and defense counsel made a representation to the court that suggested residential treatment at the Sea Change facility was one of those conditions.¹ That the court later made a statement (“And continue to reside there as a condition of your bail in this matter”) accepting what it naturally took to be the meaning of counsel’s representation does not establish the court *modified* the conditions of bail. And even if it did, defendant should be estopped from relying on his attorney’s misleading

¹ This was the pertinent exchange: “THE COURT: And your client’s out of custody on bond, correct? [¶] [Defense counsel]: Correct. [¶] THE COURT: And are there conditions that were set by the court at the time of the arraignment? [Defense Counsel]: I’m unaware. I don’t know. [¶] THE DEFENDANT: Yes, your honor. [¶] [Defense counsel]: He’s in a live-in program.”

representation (one I assume was unintentional and likely triggered by defendant himself) to obtain additional custody credits—particularly when the trial court repeatedly advised defendant he would not be entitled to such credits before the court accepted his no-contest pleas.

BAKER, Acting P. J.